TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 777.

M. WOLF, ELIAS LOWENSTEIN, AND LEON HELMAN,
PLAINTIFFS IN ERROR,

vs.

LOUIS STIX ET AL., AS LOUIS STIX & CO.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

FILED OCTOBER TERM, 1877.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 117.

M. WOLF, ELIAS LOWENSTEIN, AND LEON HEIMAN,

Plaintiffs in Error,

vs.

LOUIS NIX ET AL., AS LOUIS NIX & CO.

In Error to the Supreme Court of Tennessee.

FILED OCTOBER TERM, 1877.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1877.

MOTION.

M. WOLF, ELIAS LOWENSTEIN, AND LEON HELMAN,
Plaintiffs in Error,
No. 777. *vs.*
LOUIS STIX ET AL., AS LOUIS STIX & CO.

1st. The defendants in error move the Court to dismiss the writ of error in this cause and the said cause out of this Court for want of jurisdiction, on the ground that there is no federal question presented by the record.

2d. The defendants in error move the court to affirm the judgment of the Supreme Court of Tennessee in this cause, on the ground that although the record may show that this Court has jurisdiction it is manifest the writ of error was taken for delay only.

JOSIAH PATTERSON,
Attorney for Defendants in Error.

STATEMENT.

Only so much of the record is printed and submitted to the court as is deemed material to the questions raised by the motion. The replevin bond, the decree of the Supreme Court of Tennessee at the final hearing, the petition to that Court setting up M. Wolf's discharge in bankruptcy, and its judgment disallowing same are all in the printed record. As to all other matters deemed material by counsel for plaintiffs in error, the Court is referred to the statements made by Mr. Randolph in his brief. The defendants in error accept as true the statement of the case made in Mr. Randolph's brief as to every portion of the record therein referred to that does not purport to be set out in full in the printed record submitted to the Court.

JOSIAH PATTERSON,
Attorney for Defendants in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 777.

M. WOLF, ELIAS LOWENSTEIN, AND LEON HIRMAN,
PLAINTIFFS IN ERROR,

vs.

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JOSIAH PATTERSON,
Attorney for Defendants in Error.

STATEMENT.

By agreement of counsel only so much of the record is printed and submitted to the Court as is deemed material to the questions ed by the motion. The other portions of the record have been abreviated for the information of the court, and there will be found n the record as submitted a statement of the steps taken in the cause in the State Court in the order in which they occurred.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1877.

M. WOLF,
ELIAS LOWENSTIEN, AND
L. HELMAN, *Appellants,*
vs.
LOUIS STIX & CO. ET AL., *Appellees.*

In Equity, No.

Appeal of M. Wolf, Elias Lowenstien, and L. Helman, from the decision in the above case, by the Supreme Court of Tennessee, at the April Term, 1877.

MOTION TO DISMISS THE APPEAL.

1st. Because there is no Federal question.

2nd. Because there is no litigation, and the appeal can have no effect but delay.

So much of the Record as relates to this motion, and is necessary to its decision, is as follows:

In 1866, Louis Stix & Co. and others, being creditors of Marks, Pump & Co., a firm in business at Memphis, filed their attachment and injunction bill in the Chancery Court of Shelby County, Tenn., to subject a stock of goods pur-

chased by M. Wolf, of Marks, Pump & Co., and then in Wolf's possession, upon the ground that the sale was made to defraud creditors, and therefore void. The goods were attached and taken into custody by the Sheriff. On reference to the Master, their value was fixed at ten thousand dollars. On the second day of December, 1866, M. Wolf gave a replevy bond, according to the practice of the Chancery Court of the State of Tennessee, with Elias Lowenstien and L. Helman, as his sureties, in the sum of twenty thousand dollars, and thereupon regained the possession of the goods.

BOND.

The bond is as follows:

We, M. Wolf, as principal, and Elias Lowenstien and Leon Helman security, as sureties, hereby bind ourselves unto Louis Stix & Co., in the sum of twenty thousand dollars.

The condition of the above bond is that whereas, in the suit now pending in the Chancery Court at Memphis, in favor of said Lous Stix & Co., and against Marks, Pump & Co., and in which said M. Wolf is joined as a defendant, an attachment has been issued against said Marks, Pump & Co., for $18,699.54, besides interest and costs, and has been levied upon a stock of goods and other property as the property of said Marks, Pump & Co., which were in the possession of said M. Wolf, and were and are claimed by him as his property, and this bond is given by him for the purpose of replevying said stock of goods and other property attached, being altogether, as it is agreed by the parties, of the value of ten thousand ($10,000) dollars.

Now, in the event the said M. Wolf shall be cast in said suit, and said stock of goods and other property shall be found and decreed by the Court to have been subject to said attachment and liable thereunder to the satisfaction of the debts of complainants against Marks, Pump & Co., then and in that event, should said M. Wolf pay to complainants, as the Court may order and direct, the said sum of $10,000, the

value of said stock of goods and other property, with interest thereon from this date, this bond will be void, otherwise to remain in full force and effect.

Witness our hands and seals this — day of December, 1866.

M. WOLF, [L.S.]
ELIAS LOWENSTIEN, [L.S.]
L. HELMAN, [L.S.]

Leon Helman, the surety on this bond, makes oath that he is worth $10,000 in property subject to execution.

L. HELMAN.

Subscribed and sworn to the 24th day of December, 1866.

BENJ. COLEMAN, Dep. C. and M.

Endorsed:

Filed December 24, 1866.

A. ALSTON, C. and M.

The Record contain much proof tending to prove, and to disprove fraud.

On the 13th of December, 1872, there was a decree in the Chancery Court dismissing the bill, upon the ground, that, in the opinion of the Chancellor, the proof failed to show that M. Wolf participated in the alleged fraud. From this decree, on the 21st of March, 1873, Louis Stix & Co. and others, complainants, appealed to the Supreme Court of Tennessee, at Jackson. On the 5th of January, 1874, said Wolf filed his voluntary petition for discharge in bankruptcy, and on the 28th day of March, 1874, obtained his certificate of discharge.

On the 28th day of April, 1877, the cause was heard by the Supreme Court of Tennessee, which Court reversed the decree of the Chancellor, and decreed as follows:

DECREE.

This cause was heard upon the transcript of the Record from the First Chancery Court of Shelby County, and after argument by counsel, and full consideration by the Court,

this Court is of opinion that there is manifest error therein, and doth therefore order, adjudge and decree, that the decree of said Chancery Court be reversed, vacated and annulled.

And the Court being further of opinion that the pretended sale of the stock of goods, fixtures, &c., referred to in complainants' bill, made by defendants Marks, Pump & Co. to defendant, M. Wolf, was intended to hinder and delay their creditors, and was and is fraudulent and void as to the claims of the complainants. And it appearing from simple calculation that the said defendants, Marks, Pump & Co., are indebted to the complainants Louis Stix & Co., in their own right, principal and interest to this date, the sum of $22,480.68, and that the indebtedness of said Marks, Pump & Co., to Reinskoff Bros. & Co., for whose use the said complainants, Louis Stix & Co., also filed this bill, amounts principal and interest at this date, to the sum of $7,671.88, it is therefore ordered, adjudged and decreed by the Court that said complainants, Louis Stix & Co., in their own right, recover of said defendants, Marks, Pump & Co., said sum of $22,480.68, and that said complainants, Louis Stix & Co., for the use of Reinskoff Bros. & Co., recover of said defendants, Marks, Pump & Co., the said further sum of $7,671.88, and also the costs of this cause. And it further appearing to the Court that the stock of goods, fixtures, &c., so fraudulently attempted to be sold to defendant, M. Wolf, and which were attached in this cause, were by said M. Wolf, on the 24th day of December, 1866, replevied and taken possession of under a certain bond, executed and filed in this cause on said day, in the sum of twenty thousand dollars by said M. Wolf, as principal, with Elias Lowenstien and L. Helman as his sureties, conditioned in the event that said stock of goods, fixtures, &c., should be decreed to be subject to said attachment, and liable thereunder to the satisfaction of the debts of the complainants against Marks, Pump & Co., for the payment of the sum of ten thousand dollars, the agreed value of said goods, fixtures, &c., with interest thereon from said 24th day of December, 1866, the date of said bond. And this Court being of opinion, as before recited, that said sale was fraudulent and void, and that

said stock of goods, fixtures, &c., so attached and replevied, were subject to said attachment and liable for the payment of complainants' said debt.

And it further appearing from simple calculation, that said sum of ten thousand dollars with interest from the date of said bond, December 24, 1866, to the present time, amounts to the sum of $16,200, it is therefore further ordered, adjudged and decreed by the Court that said fraudulent sale be and hereby is set aside and for naught held as to complainants' said debts herein against defendants, Marks, Pump & Co., and that the complainants, Louis Stix & Co., in their own right, and also for the use and benefit of Reinskoff Bros. & Co., do have and recover of and from the defendant M. Wolf, and of said Elias Lowenstien and L. Helman, his sureties on the aforesaid replevin bond, the said sum of sixteen thousand two hundred dollars ($16,200), the value of the property replevied, and interest thereon to this date, for which execution may issue.

And it appearing from the Record that the said defendants Marks, Pump & Co. have been since the filing of complainants' bill discharged in bankruptcy, no execution is awarded against them for complainants' recoveries herein, and the costs of this cause in this Court and the Court below will be paid out of the said recovery of $16,200 against defendant M. Wolf and his aforesaid sureties on replevin bond.

PETITION.

On the 3d of May, 1877, said Wolf, Lowenstien and Helman filed their petition in said cause, which is as follows:

The petition of M. Wolf and Elias Lowenstien and L. Helman, all citizens of Memphis, Tennessee, respectfully shows—

That the said M. Wolf is one of the defendants in the above cause, and is the same who was the vendee of the stock of goods which the Court has decided was fraudulently sold to him by the defendants Marks, Pump & Co. on the 30th day of November, 1866, the said goods being the stock then con-

tained in store 180 Main street, Memphis, Tennessee; that the said M. Wolf, on the 2d day of December, 1866, and after the said stock of goods was attached in this suit, replevied the same under the provisions of the Code in that behalf, and in order to do so on the same day he executed a replevy bond payable to the plaintiffs in the suit in double the value of the property attached, conditioned according to law, with the said Elias Lowenstien and L. Helman as his sureties, all as will more fully appear by the Record of the cause:

That the said M. Wolf is liable in this suit only because he so replevied the said goods and so executed the said replevy bond, and that the said Elias Lowenstien and L. Helman were liable only as the sureties of the said M. Wolf, and according to the condition of the said replevy bond, and not in any other way or to any other extent;

That the final decree of the Court below was rendered on the 13th day of December, 1872, and fully discharged the said M. Wolf; and as a consequence the said Elias Lowenstien and L. Helman as his sureties from all liability on the said bond;

That after the said decree had so been rendered, and after the appeal had been taken therefrom, and while the cause was pending on appeal in this Court, to-wit, on the 5th day of January, 1874, the said M. Wolf, in accordance with the provisions of the Act of Congress to establish a uniform system of bankruptcy throughout the United States, filed his voluntary petition for a discharge in bankruptcy, and subsequently was adjudged a bankrupt, and thereafter was granted a certificate of discharge from his debts and liabilities in the words following:

UNITED STATES OF AMERICA.

District Court of the United States, Western District of Tennessee.

WHEREAS, M. Wolf, of Shelby County, Tennessee, has been duly adjudged a bankrupt under the Act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the Court that said M. Wolf be forever discharged from all debts

and claims which by said Act are made provable against his estate, and which existed on the 5th day of January, 1874, on which day the petition for adjudication was filed by him, excepting such debts if any as are by said Act excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the Court at Memphis, in said District, this 28th day of March, A. D. 1874. Signed,

[L.S.] CONNALLY F. TRIGG.

Petitioners are advised that the effect of the said discharge was and is to release and absolve the said M. Wolf from all liability on or in consequence of having signed the said replevy bond, and necessarily also to release and absolve the said Elias Lowenstein and L. Helman as his sureties on the said bond, from all liability as such sureties.

In consideration of the premises, and forasmuch as the cause is heard *de novo* in this Court, and petitioners by reason of the facts aforesaid had no opportunity of availing themselves of the benefit of the said discharge in the Court below, they pray that this Court will now allow this petition to be filed as and become a part of the Record in this suit, and will consider the said discharge, and by its decree will give such operation and effect as the same might by law have, as well in behalf of the said Elias Lowenstein and L. Helman, his sureties.

Or, if the Court is of opinion that what has just been asked for is not proper, then petitioners pray that no final decree may now be entered in this cause, and that the same may be remanded to the Court below for further proceedings (Code, sec. 3170), with proper directions to effectuate the rights of petitioners under the said discharge, and such other directions as may be deemed proper.

KORTRECHT & CRAFT, AND
RANDOLPH, HAMMOND & JORDAN,
For Petitioners.

SHELBY COUNTY, } ss.

I, M. Wolf, one of the petitioners in the foregoing petition, do swear that the matters therein stated are true to the best of my knowledge, information and belief.

M. WOLF.

Subscribed and sworn to before me, this 28th April, 1877.

JNO. T. ELLIOTT, J. P.,
Shelby County, Tenn.

Endorsed:

Filed May 3d, 1877.
JNO. H. FREEMAN, Clerk.

This petition was accompanied by the affidavit of M. Wolf, which alleges that he did not communicate to his attorneys the fact that he had been discharged in bankruptcy, and was not aware that the same could be made available in his defense, or that of his sureties on the replevin bond.

This affidavit was made April 30, 1877.

The affidavit of Elias Lowenstien of same date, was filed, alleging his ignorance of Wolf's discharge in bankruptcy until after he learned of the decision of the Supreme Court reversing the decree of the Chancellor, and declaring Wolf and sureties liable for the value of the stock of goods.

On the 3rd of May, 1877, Messrs. Kortrecht & Craft made their joint affidavit, in which it is alleged that they were not aware of the discharge in bankruptcy of their client, M. Wolf, until after the decision against him and his sureties, in the Supreme Court.

Of same date the affidavit of E. S. Hammond, Esq., was made. It alleges that he was of counsel in the cause; first learned of M. Wolf's discharge in bankruptcy on the 28th of April, 1877, and after he had received information of the decision adverse to M. Wolf and his sureties; that after consultation, he telegraphed to the Clerk of the Supreme Court

not to enter the decree until counsel could reach the Court on the following Monday, but learned afterwards that it had been then entered, or was then being entered. On reaching the Court on Monday, the minutes containing the decree were being signed; and the petition of Wolf and sureties was not then filed, but deferred, and filed May 3rd, 1877.

The Court considered the petition of Wolf and sureties, and the said affidavits; and on the 12th of May, 1877, rendered the following

DECISION:

The Court having considered the petition of the defendant, M. Wolf, and the affidavits in support thereof, viz.: the affidavit of M. Wolf, E. Lowenstien, Charles Kortrecht, Henry Craft and E. S. Hammond, heretofore filed in this cause, praying that the said M. Wolf be allowed to set up his discharge in bankruptcy, set out in said petition, by the proper plea in this Court, or else that the said cause be remanded to the Chancery Court of Shelby County, to allow the said discharge to be there pleaded, in bar of the cause of action set up in this suit, and that the decree heretofore entered be vacated and set aside for that purpose, and being of opinion that no new defense can be made in this Court, and that it is not allowable to set up the defense of bankruptcy by any proceeding here for that purpose, it is therefore ordered, adjudged and decreed by the Court, that the said motion be and the same is now overruled and disallowed, and the said petition dismissed, and that the said defendant pay the costs of this motion and petition as other costs of the cause are paid, for which let execution issue.

From this decision, the said M. Wolf, Elias Lowenstien and L. Helman, prosecute an appeal to this Court.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1877.

M. WOLF, ELIAS LOWENSTEIN,
AND
LEON HELMAN,
vs.
LOUIS STIX, AND OTHERS.

No. 777.

BRIEF FOR PLAINTIFFS IN ERROR ON THE MOTION TO DISMISS THE WRIT OF ERROR.

Tracy & Co., Printers, 250 Second St., Memphis.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1877.

M. WOLF, ELIAS LOWENSTEIN,
AND
LEON HELMAN,
vs.
LOUIS STIX, AND OTHERS.

No. 777.

BRIEF FOR PLAINTIFFS IN ERROR ON THE MOTION TO DISMISS THE WRIT OF ERROR.

The plaintiffs in error deny that enough of the record is printed on this motion to enable the court to pass intelligently on the questions, and they therefore insist that the court shall look to the whole record, and not confine itself to the fragmentary portions the defendants in error have seen proper to print.

The motion to dismiss professes to be based upon two grounds.

1. There is no Federal question.

2. There is no litigation—the appeal (writ of error I presume is meant) can only operate by way of delay.

As to the second ground, which I suppose means that there are no merits in the case of the plaintiffs in error:

This is a question this court will not dispose of until the hearing—the plaintiffs in error having a right to be heard upon it before it is decided.

Amory vs. Amory, 91 U. S., (1 Otto), 356.

Is there a Federal question in the record?

The facts necessary to be understood are about these:

Marks, Pump & Co. were indebted to Louis Stix & Co., by note, for goods sold them.

They made a conveyance of a stock of goods they owned in Memphis, and other property, to M. Wolf.

Louis Stix & Co. then filed a bill in the Chancery Court of Shelby county, making Marks, Pump & Co., and M. Wolf, parties as defendants. In the bill they claimed that Marks, Pump & Co. were indebted to them on the notes, but did not pretend M. Wolf owed them anything. They attacked the conveyance Marks, Pump & Co. had made to M. Wolf on the ground that it had been made to hinder, delay and defraud the creditors of Marks, Pump & Co., and caused a writ of attachment against the property of Marks, Pump & Co. to be sued out, and to be levied on the goods and other property which Marks, Pump & Co. had conveyed to M. Wolf, as the property of Marks, Pump & Co.

The prayer of the bill was that Louis Stix & Co. have a decree against Marks, Pump & Co. for the debt Marks, Pump & Co. owed them, and that the goods attached be sold to satisfy the decree.

Section 3509 of the Code of Tennessee provides:

"The defendants to an attachment suit may always replevy the property attached by giving bond with good security, payable to plaintiff in double the amount of the plaintiff's de-

mand, or, at the defendant's option, in double the value of the property attached, conditioned to pay the debt, interest and costs, or the value of the property attached, with interest, as the case may be, in the event he shall be cast in the suit."

And Section 3514 provides:

"The court may enter up judgment or decree upon the bond in the event of a recovery by the plaintiff, against the defendant and his sureties for the penalty of the bond, to be satisfied by the delivery of the property or its value, or payment of the recovery, as the case may be."

M. Wolf alone appeared and replevied the property attached, claiming to be the owner, and gave a replevy bond, with the plaintiffs in error, Lowenstein and Helman, as his sureties, payable to Louis Stix & Co., in the penalty of twenty thousand dollars, conditioned that in the event M. Wolf should be cast in the suit, and the stock of goods and other property should be found and decreed by the court to have been subject to said attachment, and liable thereunder to the satisfaction of the debts of Louis Stix & Co. against Marks, Pump & Co., then and in that event, should M. Wolf pay to Louis Stix & Co., as the court might order and direct, the sum of ten thousand dollars, the value of the stock of goods and other property, with interest thereon from the date of the bond, the bond would be void, otherwise to remain in full force and effect.

Subsequently the cause was heard in the Chancery Court, and on the 13th day of December, 1872, the Chancellor decreed there was no fraud in the conveyance by Marks, Pump & Co. to M. Wolf, that the property conveyed was the property of M. Wolf, and not liable to the attachment, and that the bill of Louis Stix & Co., as to M. Wolf, be dismissed. Record, p. 729–731.

The members of the firm of Marks, Pump & Co. having, in the meantime, on their voluntary petitions, been discharged in bankruptcy, the bill as to them was at the same time dismissed.

From the decree so pronounced in the Chancery Court, Louis Stix & Co, on the 21st March, 1873, appealed to the Supreme Court of Tennessee, where, at the April term, 1877, on the 28th of April, 1877, the decree of the Chancery Court was reversed, the conveyance by Marks, Pump & Co. to M. Wolf was declared to have been made by Marks, Pump & Co. to hinder, delay and defraud their creditors, and, therefore to be void, and a decree was pronounced setting aside the conveyanee as to Louis Stix & Co.'s debts against Marks, Pump & Co., and that Louis Stix & Co. recover of M. Wolf, and of Lowenstein and Helman, his sureties in the replevy bond, the sum of $16,200, the value of the property replevied, and interest thereon, and that execution issue. Record, p. 731, 733–737.

The court, in the same decree, then proceeded to order that no execution issue against the defendants, Marks, Pump & Co., on the decree, because, since the filing of the bill of Louis Stix & Co., they had been discharged in bankruptcy.

On the 3d day of May, 1877, at the same term of the court, M. Wolf, Lowenstein and Helman, under the leave and order of the court, filed their petition in the Supreme Court, setting up the fact that M. Wolf's liability, and the liability of Lowenstein and Helman arose solely by the execution by them of the replevy bond, in the manner already stated, and that all of them had been discharged on the final hearing, as before stated, by the decree of the Chancery Court dismissing the bill as to M. Wolf. Also, that on the 5th January, 1874, after the decree of the Chancery Court had been rendered, and while the cause was pending on the appeal in the Supreme Court, M. Wolf, in accordance with the provisions of the act of Congress to establish a uniform system of bankruptcy throughout the United States, had filed in the District Court of the United States for the District of West Tennessee, his voluntary petition in bankruptcy, and subsequently had been by the said court adjudged a bankrupt, and thereafter on the 28th March, 1874, had been granted a certificate of discharge in due form of law from his debts and liabilities, which the petition then proceeded to set out in words, and the petitioners produced in court. The petition claimed that the effect of M. Wolf's pro-

ceeding in bankruptcy, and of his discharge, was to release and discharge him and his sureties, Lowenstein and Helman, from liability by reason of having signed the replevy bond, and from any further proceeding against them to enforce any liability on the bond.

The petition prayed, forasmuch as the case was heard *de novo* in the Supreme Court, and the petitioners, by reason of the facts stated, had been afforded no opportunity of availing themselves of the benefit of the discharge of M. Wolf in the Chancery Court, that the court would then allow the petition to be filed and to become a part of the record in the suit, and would consider the discharge, and by its decree would give it such operation and effect as it ought by law to have, as well in behalf of M. Wolf as in behalf of Lowenstein and Helman, his sureties.

Or, if the court was of opinion that the above prayer could not be granted, then that no final decree might then be entered in the cause, and that the cause might be remanded to the Chancery Court for further proceedings, with proper directions to effectuate the rights of the petitioners under M. Wolf's discharge, and such other directions as it might deem proper.

The petition was sworn to at Memphis, where the parties and their attorneys reside, on Saturday, the 28th April, 1877, the day on which the opinion was delivered in the Supreme Court of the State at Jackson. On that day the counsel of Wolf, Lowenstein and Helman telegraphed the Clerk of the Supreme Court not to enter the decree until the counsel could reach the court on the following Monday, but the request was not regarded, and when the counsel went into court on Monday the minutes containing the decree were being signed.

Neither Lowenstein nor Helman were informed of Wolf's petition or discharge in bankruptcy until after they heard of the decision of the cause by the Supreme Court on the 28th April, 1877. The counsel of Wolf managing the cause in his behalf in the Supreme Court were not informed of his petition or discharge in bankruptcy until after the decision of the cause by the Supreme Court.

M. Wolf did not communicate the fact of his petition or discharge in bankruptcy to his attorneys in the cause until after he had heard of the decision by the Supreme Court, and he was entirely ignorant of the fact that he could make his proceedings in bankruptcy, or discharge, available as a defence to himself or the sureties on his replevy bond in the Supreme Court.

All these facts were made to appear to the Supreme Court, by affidavits, which are in the record (see transcript, pages 744–751), and were not disputed or questioned.

On the 12th May, 1877, as the record states, the Supreme Court having considered the petition of Wolf, Lowenstein and Helman, and the affidavits in support thereof, theretofore filed in the said cause, praying that the said Wolf be allowed to set up his discharge in bankruptcy, set out in the petition by proper plea in the Supreme Court, or else that the said cause be remanded to the Chancery Court of Shelby county to allow the said discharge to be there pleaded in bar of the cause of action set up in said suit, and that the decree theretofore entered be vacated and set aside for that purpose, and being of opinion that no new defense could be made in the Supreme Court, and it was not allowable to set up the defence of bankruptcy by any proceeding there for that purpose, ordered, adjudged and decreed that the said motion be and the same was then overruled and disallowed, and that the said petition be dismissed, and that the defendants pay the costs of the motion as other costs of the cause were paid, for which execution would issue. Record, p. 751–752.

M. Wolf, also, according to the practice of the court, filed a petition in the Supreme Court to vacate the decree of 28th April, 1877, and rehear the cause, assigning grounds for his petition, and the court overruled the same. Record, p. 753–772, 773.

The question the plaintiffs in error present, and which they claim the court has jurisdiction to decide, is, did not the proceeding and discharge in bankruptcy of M. Wolf release him from liability on the replevy bond, and entitle him to have the

proceedings in the suit in the Supreme Court of Tennessee absolutely cease before any final judgment or decree was pronounced therein against him, and did not the Supreme Court err in proceeding to render the decree, and in refusing to consider and give effect to such discharge, or in refusing to withhold the final decree and to remand the cause to the Chancery Court, so that the discharge might be set up and relied upon therein as a defence to the further prosecution of the suit?

The fact clearly appears in the record that Wolf, Lowenstein and Helman pleaded and produced Wolf's discharge in bankruptcy, and relied upon it as a defense to the further prosecution of the suit against Wolf, and a bar to any final judgment against him, and that the Supreme Court of Tennessee overruled and rejected the defence so set up, and gave judgment against Wolf and Lowenstein and Helman, notwithstanding the same.

The Bankrupt Act, Revised Statutes United States, Section 5106, Act of 1867, Section 21, provides:

"No creditor whose debt is provable, shall be allowed to prosecute to *final judgment* any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined: and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the Court in Bankruptcy on the question of the discharge, *provided*, there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge."

The statute makes no exception of any court, and does not discriminate as to the condition of the suit. It embraces all suits in all courts, where a provable debt is sued for. No judgment shall be rendered in any.

It likewise provides, Revised Statutes United States, Section 5119.

"A discharge in bankruptcy, duly granted, shall, subject to the limitations imposed by the two preceding sections, release

the bankrupt from all debts, claims, liabilities and demands which were, or might have been, proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms, as a full and complete bar to all suits brought on any such debts, claims, liabilities or demands. The certificate shall be conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge."

Here again no exception is made. The right to plead the discharge in bar of *all* suits on *any provable* debt is expressly given, and the discharge with the exceptions indicated by the statute itself, is to be a full and complete bar to all such suits. The court, the condition of the suit, the time when it was brought, are of no consequence It is enough that the suit is pending, and has not proceeded to *final judgment.*

Under these provisions the bankrupt is entitled, as a matter of absolute right, to a continuance of *all* suits until the question of his discharge is determined, and no step can lawfully be taken in any suit until such determination, unless there is unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge.

Ray vs. Wright, 119 Massachusetts, 426.
National Bank of Clinton vs. Taylor, 120 Massachusetts, 124.
In Re Rosenberg, 3 Benedict, 14.
In Re Metcalf, 2 Benedict, 78.

And the right to the stay or continuance does not depend upon the question whether or not his discharge will release the debt. He is entitled to have the proceedings in *all* suits stop.
In Re Rosenberg, 3 Benedict, 14.
In Re Ghirardelli, 1 Sawyer, 343.

The right to the stay or continuance of suits pending in courts of original jurisdiction has never been denied a bankrupt, and it is a matter of course to receive the suggestion of a pending bankruptcy, and to enter the stay order thereupon.

When his right to discharge has been determined in his favor he then has the absolute right to plead such discharge as a complete defence to the action, if for a provable debt, and is entitled thereupon to a final judgment in his favor.

Lewis vs. Shattuck, 4 Gray, 572.

Carpenter vs. Terrell, 100 Massachusetts, 450.

In McKay vs. Funk, 37 Iowa, 661, it was held that no personal judgment could be rendered by a State court against a defendant in a suit to foreclose a mortgage, although a decree of foreclosure might be entered, and that the error was not cured by an order staying execution on the judgment.

The court said: "Doubtless it was esteemed by the court below that the order staying the execution fully complied with the requirements of the section of the bankrupt act just cited; but it does not so appear to us. After the motion was filed nothing ought to have been done further than the entering of an order staying proceedings. But a judgment was rendered, which, however, was not to be enforced by execution until the further order of the court. The law was not followed, and the judgment against the defendant personally was therefore erroneous and must be reversed."

It does not in any manner alter the rights of the parties that there are sureties of the bankrupt, bound along with him by a bond taken in the progress of the cause, conditioned to pay the recovery that may be had against him in the action. No special judgment, having for its object the enforcing of the liability of the sureties on such bond can be rendered. The liability of the sureties depends on the general right of recovery by the plaintiff against the bankrupt, and, as that recovery can not be had, such liability of the sureties never attaches.

Carpenter vs. Terrell, 100 Massachusetts, 450.

Payne vs. Able, 7 Bush (Ky.), 344.

Odell vs. Wooten, 38 Georgia, 224.

Loring vs. Eager, 3 Cushing, 188.

Hamilton vs. Bryant, 116 Massachusetts, 543.

Williams vs. Atkinson, 36 Texas 16.

Martin vs. Kilbourne, 1 Central Law Journal, 94.
Nettleton vs. Billings, 17 New Hampshire, 453.
Kirby vs. Garrison, 1 Zabriskie, 179.
Barbour vs. Rodgers, 71 Pennsylvania St., 362.
Hubert vs. Horter, 81 Pennsylvania St., 39.

And see, as showing the bond in this case is similar to the bonds under consideration in the above cases—

Code of Tennessee, Sections 3509, 3514 and 3515.
Wells vs. Griffin, 2 Head, 568, 570.
James vs. Galloway, 7 Heiskell, 678.

It is, therefore, out of the fact that the proceeding in bankruptcy of Wolf, and his subsequent discharge, had the legal effect of stopping the prosecution of the suit by Louis Stix & Co. against him, beyond the time when he was adjudicated a bankrupt, and prevented absolutely the rendition of any judgment or decree in the suit against him, that the exemption of Lowenstein and Helman from liability as the sureties on the replevy bond, grows.

The express condition of the liability of the sureties on the bond is that there should first be a recovery against Wolf, the defendant in the suit, and the principal in the bond.

Code of Tennessee, Section 3509.

The cases are numerous which hold that in such bonds, or similar bonds, the sureties are not liable unless there is a recovery in the suit against the principal of the sum the sureties are to be held for, and that any fact which prevents a recovery against the principal, or determines the suit without such recovery, puts an end to the liability of the sureties. See, in addition to the authorities cited above—

Smith vs. Eakin, 2 Sneed, 456.
Carren vs. Breed, 2 Coldwell, 465.
Bump on Bankruptcy (9 Ed'n), p. 733–734.

The release of the sureties is not the effect of the discharge, considered merely with reference to its effect as a discharge, but results from "the determination of the contingency upon which the obligation of the bond is made to depend."

The provision in Section 5118 of the Revised Statutes United States, Bankrupt Act, Section 33, that "no discharge shall release, discharge or affect any person liable for the same *debt* for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise," has therefore no effect on the question.

It will not, of course, be argued that that provision extends the liability of a surety beyond the terms of his undertaking in his bond.

The Supreme Court of Georgia has declared that the provision in the bankrupt act as to sureties was declaratory merely of what the law was before.

Phillips vs. Solomon, 42 Georgia, 192, 195.

The Supreme Court of Tennessee has declared that the provision "only applies to a surety who contracted to become liable for the payment of *the debt*, and not for the payment of *the judgment*, which might be entered in a particular action."

Martin vs. Kilbourn, 1 Central Law Journal, p. 94.

It requires no argument to show that the question the plaintiffs in error present arises directly under the Bankrupt Act, and hence that they are in the precise category which entitles them to have the judgment of this court on the merits of their case.

The State Court has denied Wolf the rights which he claimed were conferred on him by an act of Congress, and has also refused to give effect to the judgment of the District Court of the United States for the District of West Tennessee declaring that "he was discharged from all debts and claims which by the said act are made provable against his estate, and which existed on the 5th day of January, 1874."

And it is entirely impossible that the judgment or decree the Supreme Court of Tennessee rendered against Wolf, Lowenstein and Helman could have been rendered had that court not decided the claim or right set up by them under the act of Congress and the judgment of the District Court of the United

States for the District of West Tennessee, adversely to them.

In Kanouse vs. Martin, 14 Howard 23, the court decided that the denial by a State court of the right to remove a suit from the Circuit Court of the United States under the twelfth section of the judiciary act of 1789, authorized a writ of error to the Supreme Court of the United States under the twenty-fifth section of the act.

Weston vs. City Council of Charleston, 2 Peters, * p. 449, was a case where a tax was imposed which was alleged to be in violation of the Constitution of the United States, and the jurisdiction was sustained.

Lessieur vs. Price, 12 Howard, * p. 59, was a case where title to land under a certificate granted by authority of an act of Congress, known as a New Madrid certificate, was set up, and the State court decided against the title, and the Supreme Court of the United States entertained jurisdiction.

Martin vs. Hunter's lessee, 1 Wheaton, * p. 304, was the case of a title claimed to be protected by a treaty, which the State court decided not to be the case.

Peck vs. Jenness, 7 Howard 612, was a case involving a question arising under the bankrupt act of 1841, decided by the Superior Court of New Hampshire, and this court entertained jurisdiction by a writ of error to that judgment.

In Mathews vs. McStea, 20 Wallace, 646, the question presented was: Did the acts of the President in inaugurating the late war make unlawful the acceptances of certain bills of exchange? The court entertained jurisdiction on error to the State court.

In Dupasseur vs Rochereau, 21 Wallace, 130, the question was whether the State court had given proper effect to a judgment of the Circuit Court of the United States, where it had been set up as a defence in a suit in the State court.

Justice Bradley delivering the opinion said:

"Where a State court refuses to give effect to the judgment of a court of the United States, rendered upon the point in dispute, and with jurisdiction of the case and parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision."

In Gregory vs. McVeigh, 23 Wallace, 294, a purchase under a judgment of a District Court of the United States was set up as a defence in an action to recover land, and the State court held the judgment and the title claimed under it void This court sustained a writ of error.

In O'Brien vs. Weld, 92 U. S. (2 Otto), 81, in an action to recover money, the defendant attempted to protect himself under an order in bankruptcy of the District Court of the United States, and the State court overruled his defence. This court reviewed and reversed the judgment on error.

In the City of New Orleans vs. Armas, 9 Peters, * p. 223, the principle is announced that the twenty-fifth section of the judiciary act of 1789 extends the jurisdiction of this court to rights protected by the constitution, treaties and laws of the United States, from whatever source those rights may spring."
9 Peters * p. 234.

It is unnecessary to multiply authorities.

As to the manner in which the question is presented:

In Bridge Proprietors vs. Hoboken Company, 1 Wallace, 116, 143, the court, after stating the general rule that the fact giving jurisdiction to the Supreme Court must appear from the record, and noticing the position that the record must affirmatively show that the particular question conferring the jurisdiction was decided by the State court, said:

"But the true and rational rule is that the court must be able to see clearly from *the whole record* that a certain provision of the constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

In Furman vs. Nichol, 8 Wallace, 44, 56, the court said:

"If the record shows, either by express averment or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand, then the jurisdiction of this court attaches."

In Murdock vs. Memphis, 20 Wallace, 590, 633–636, the court considered the question as affected by the act of Congress of 1867, Revised Statutes, Section 709, and the statutes of the several States, and the new modes of proceeding in the State courts, and declared its opinion that it is not so closely restricted to the face of the record in determining whether one of the questions mentioned in the act of 1867 has been decided by the State court, as under the act of 1789, and that it might, under that statute, look to the properly certified opinion of the State court, when there was one in the case.

And in the same case the court, in substance, announced the following rule: That when it appears that one of the questions mentioned in the statute must have been raised and presented to the State court, and must have been decided by the State court against the right claimed or asserted by the plaintiff in error, under the constitution, treaties, laws or authority of the United States, or that such decision was necessary to the judgment or decree rendered in the case, the Supreme Court has jurisdiction, and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State court.

And see further on the question what this court will look to in determining whether there was or was not a Federal question presented in the State court:

Kanouse vs. Martin, 15 Howard, 198, more fully stated further on in this argument.

Is it not enough that a Federal question is presented in the record to require the overruling of a motion to dismiss for want of jurisdiction? Or must the plaintiff in error go further, and show affirmatively that the question is *so* presented in the record as to require a reversal of the judgment?

When the case of Kanouse vs. Martin, 14 Howard, 23, was before the court on a motion to dismiss for want of jurisdiction, after deciding that the case was within the 25th Section of the Judiciary Act of 1789, the court decided further: "That the question of the authority of the Superior Court of the City of New York to retain the case, and the validity or invalidity of its proceedings and judgment, after the motion to remove, according to the practice of the court, would stand for hearing when the case was reached in the regular call of the docket."

In Furman vs. Nichol, 8 Wallace, 44, 56, the court said:

"It need not appear that the State Court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiffs in error, and that the court was induced by it to make the judgment, which it did."

It appears to me my argument should stop here, as I do not think it probable the court will look to the record and determine on this motion whether or not the Federal question is so presented in the record as to require a reversal of the judgment of the Supreme Court of Tennessee.

That will be the question on the hearing.

But as the court may take a different view, I will attempt now to show that the question *is* so presented as to show the Supreme Court of Tennessee necessarily did err in deciding it as it did.

It is very plain that Wolf's liability in the suit to Louis Stix & Co., whether it be considered as arising out of the supposed wrongful taking or conversion or withholding by him of the goods or chattels conveyed him by Marks, Pump & Co., (which is not at all an admissible ground of liability), or grows out of the replevy of the property attached and the execution of the replevy bond, *is* such a liability as was released by his discharge.

Revised Statutes U. S., Sec. 5067, 5068 and 5119.

Tobias vs. Rogers, 13 New York R., 59.

Cash vs. Quinichet, Mss. Op. Sup Ct. Tenn., Jackson, April Term, 1873.

Choate vs. Quinichet, Mss. Op. Sup. Ct. Tenn., Jackson, Fall Term, 1873.

The position that Wolf's liability was not released by his discharge in bankruptcy, because it was created by his fraud, is simply preposterous.

"Revised Statutes of U. S., Section 5117, provides:

"No *debt* created by the fraud or embezzlement of the bankrupt * * * * shall be discharged by proceedings in bankruptcy."

The liability to come within the exception must take the form of *a debt*, which necessarily supposes that the bankrupt has become a debtor to the amount of the debt, and that he has incurred the debt to the person to whom he owes it by such direct fraud or embezzlement committed upon or against such person as necessarily places him under legal obligation to pay him the amount of it.

It is not claimed that Wolf ever incurred any debt to Louis Stix & Co., except by becoming the vendee of the property which the Supreme Court of Tennessee has adjudged Marks, Pump & Co. fraudulently conveyed him, or else, by executing the replevy bond, and replevying the property attached.

The liability growing out of the replevy bond will not be noticed now.

As to the other, the liability resulting from being the vendee in a fraudulent conveyance, it is certainly settled that the only right a crediter of a vendor who makes a conveyance of his property to hinder, delay or defraud his creditors has, is to seize the specific property conveyed and subject it to the payment of his debt in the same manner he would have done had no conveyance by his debtor been made.

The statute, Code of Tennessee, Section 1759, has not given him any right of action against the fraudulent vendee, and

surely neither the statute, nor any known principle of the common law, converts the vendee into a debtor to the creditors of the vendor, or any one or more of them, for the amount of the value of the property conveyed, or any other amount.

The law in Tennessee on this question is clearly settled.
Tubb vs. Williams, 7 Humphreys, 367, 371–372.
Richards vs. Ewing, 11 Humphreys, 327, 331–332.

Adler vs. Fenton 24 How 410

The bill of Louis Stix & Co. did not seek any decree against Wolf *personally* on the ground of fraud, or on any other ground. Its sole purpose was to have a recovery against Marks, Pump & Co., who alone were charged as debtors, and to have the property alleged to have been fraudulently conveyed Wolf, attached as the property of Marks, Pump & Co., and sold and applied to the payment of their debt.

And the decree of the Supreme Court of Tennessee, by which it is claimed Wolf's liability has been fixed, does not profess to proceed on the theory that any fraud of Wolf had imposed a liability on him, but, on the contrary, altogether ignoring the idea of fraud it proceeds to declare Wolf, as well as Lowenstein and Helman, his sureties liable, because, and only because, they had executed the replevy bond, and thereby had replevied the property, and in that way had become liable for the value of the property and interest.

It can not be denied that if Wolf had given up the property attached upon the levy of the attachment upon it, and had not executed the replevy bond, and thereby replevied the property, all liability on his part in respect to the property, or resulting from the conveyance by Marks, Pump & Co., would have been at an end.

If Wolf's liability results from having executed the replevy bond, it must necessarily be just such a liability as the execution of the bond imposed, and no other.

The Code of Tennessee, Section 3509, expressly gave Wolf the legal right to execute the replevy bond, and thereby replevy the property attached. His doing so, then, could not

possibly be construed into the creation of a debt by fraud or embezzlement. Such a construction would violate the spirit of the maxim, "*Executio juris non habet injuriam.*"

Broom's Legal Maxims, * p. 124, etc.

See United States vs. Rob Roy and Cargo, 1 Wood, S C. C., 42, for a decision having the same application.

But, I submit, the court ought not to pass upon the question of fraud in the creation of the debt until Wolf has had an opportunity of setting up his discharge as a defence to the suit to recover it, and has been afforded an opportunity of offering testimony, and of being heard in support of his plea.

And even if the court could not distinctly see that there was no fraud nor embezzlement in the creation of the debt which Louis Stix & Co. are attempting to collect from Wolf, I confidently insist the court would still decide it was error to reject or to refuse to consider the discharge, when offered as a defence, as the Supreme Court of Tennessee did.

It is apparent that in many cases there is the same necessity for receiving the suggestion of the bankruptcy, and staying the proceedings in Appellate Courts, as in courts of original jurisdiction. In no other way can the bankrupt have the protection the law intends to afford him.

Take the present case, for instance, where Wolf had a decree in the court below, and where the Supreme Court had the power upon reversing the decree to pronounce such a decree as the Chancery Court ought to have rendered, how could Wolf protect himself, as the bankrupt act contemplates he might, if he could not bring to the notice of the Court of Appeals, first the pendency of his petition in bankruptcy, and afterwards when it occurred, the fact that he had obtained his certificate of discharge?

It has been decided that a judgment in a state court against a bankrupt which has been duly appealed from by him is not, under Section 21 of the Bankrupt Act, a *final judgment*, and that

proceedings in the Appellate Court, under the appeal after the bankruptcy, are forbidden.

In Re Metcalf, 2 Benedict, 78.

In Re Leszynsky, 3 Benedict, 487.

The Bankrupt Act is to be treated by the state courts with the same respect as if it were a statute of the state. The defence based on the certificate of discharge granted under its provisions is not to be regarded as iniquitous or unconscionable, and rejected on technical or unsubstantial pretexts, but must be regarded as a just and valid defence, founded on what the Legislative wisdom of the Nation has determined, be considerations of strict right and sound public policy. A judgment by default will be set aside, and a bankrupt allowed to plead his discharge, when a seasonable application is made, and he has not been guilty of negligence in bringing it forward sooner.

Comm. vs. Huber, 5 Penn. L. J., 331.

Shurtleff vs Thompson, 63 Maine, 118.

Bank vs. Webster, 48 New Hamphire 21.

Lee vs. Phillips, 6 Hill, New York, 246.

Todd vs. Barton, 117 Massachusett, 291.

Not a Court of Appeals in the United States, so far as I have been able to ascertain, except the Supreme Court of Tennessee, refuses to permit a suggestion of a pending bankruptcy, or to allow the discharge when granted to be pleaded as a release of the liability sought to be enforced; and when the suggestion ii made or the discharge is pleaded, they invariably give them such operation and effect as will secure to the bankrupt the protection intended to be afforded him by the Bankrupt Act.

See Fox vs. Weed, 21 Louisiana, An., 58.

Viosca vs. Weed, 22 Louisiana, An., 218.

Exchange Bank vs. Knox, 19 Grattan, 789.

Odell vs. Wooten, 38 Georgia, 225.

Haggerty vs. Morrison, 59 Missouri, 324.

Bank of Bellows Falls vs. Onion, 16 Vermont, 470.

Parks vs. Goodwin, 1 Michigan, 35.

Connell vs. Dakin, 38 New York, 253.

Bostwick vs. Dodge, 2 Douglass (Michigan), 331.

In this last case, the bankrupt, against whom the judgment

had been rendered in the lower court, neglected to inform his attorney that he had his discharge, supposing there was no necessity to do so, and the case was heard without the discharge being set up, and the judgment below was affirmed by the Supreme Court. Afterwards, on motion, the Supreme Court granted a perpetual stay of execution on the judgment.

It is evident that the particular remedies the bankrupt is entitled to will depend upon the exact position of the case in the Appellate Court If, as the case stands, when he goes into bankruptcy there is no final judgment against him, in the Appellate Court, either by reason of the fact that he had judgment in his favor in the court below, or because the appeal, by which he has transferred the cause, had the effect of abrogating the judgment of the court below against him, then, by the very words of the bankrupt act, he is entitled to have the suit stop at the point where it is, until he has obtained his discharge, and then, upon the production of the discharge, to have a judgment thereupon in his favor, unless the other party chooses to withdraw his action.

On the other hand, if there has been a judgment against the bankrupt in the lower court, and there is merely a writ of error to the judgment, or some appellate proceeding having the effect of a writ of error, it may not be material whether the judgment below is affirmed by the Court of Appeals, and a perpetual stay of execution thereupon awarded, or the proceeding by appeal is dismissed and the judgment of the court below allowed to stand as the evidence of the liability, leaving the bankrupt to avail himself of his discharge when it is attempted to be enforced against him personally.

See Monroe vs. Upton, 50 New York, 593.

But certain it is that no proceeding or judgment in the Appellate Court, *after* the bankruptcy, can be allowed, consistently with the act of Congress, to affect the personal rights of the bankrupt, or his personal liability, as they were on the day he became bankrupt.

In utter disregard of the rights of the bankrupt and of the provisions of the Bankrupt Act, the Supreme Court of Ten-

nessee has established the arbitrary rule of practice that it will not receive a suggestion of a pending bankruptcy, or allow a discharge in bankruptcy to be pleaded, or in any way brought before it; nor will it remand the cause in order that the bankrupt may have the benefit of his bankruptcy, or his discharge in the lower court, but will proceed on the *technical record* before it, and without reference to the fact of a pending bankruptcy, or the existence of a discharge, and, if it be a case where it has the power to do so, will pronounce a judgment or decree for a provable debt against a bankrupt, and those who may be liable as his sureties, though only for the recovery which may be had *against him*, and leave him and them to such remedies as they may be able to obtain outside of the court.

And this rule it applies indiscriminately to cases at law and cases in equity, to cases of appeal and cases of writs of error; to cases where the bankrupt had judgment against him in the court below, and cases where the judgment was in his favor.

See Riggs vs. White, 4 Heiskell, 503.

Longley vs. Swayne, 4 Heiskell, 506, *note*.

Anderson vs. Reeves, 4 Legal Reporter, p. 129.—August, 1877, No.

In its judgment in this case the Supreme Court of Tennessee says:

"Being of opinion that no new defense can be made in this court, and that it is not allowable to set up the defence of bankruptcy by any proceeding *here* for that purpose, it is ordered," etc. Record, p. 751–752.

The refusal to consider the discharge is not put on the ground that it was not brought to the notice of the court in proper time, or before the hearing of the cause, or any other such reason, but on the broader ground that the court, considering it as offered at the proper time and in the proper way, would take no notice of it, and give no effect toit.

The fact that the parties and their counsel had the right to rely upon the known practice of the court, and could not be *required*

to attempt to do what they all knew the practice of the court would not *permit* them to do, namely: suggest the pendency of Wolf's bankruptcy before his discharge, or, afterwards, offer to plead his discharge as a bar to the suit, no doubt satisfactorily accounted to the court for the delay in bringing the discharge to its notice, and for the manner in which it was done.

Or, it may be that the petition of Wolf, Lowenstein and Helman, and the proof filed in support of it, satisfied the court that they had exercised the required diligence in bringing forward the discharge.

At least it is enough to be able to say the court did not reject it because of any negligence or default in offering it.

I do not deny that the jurisdiction of the Supreme Court of Tennessee is generally appellate, nor as a general proposition that it may prescribe, and must be the judge of, its own practice.

But Judge Catron said a long time ago, and it is equally true now:

"The theory that this is a mere court of errors and appeals in Chancery causes is greatly at war with the practice. Often it is compelled to exercise most extensive original jurisdiction in order to afford the relief the court below ought to have given. Thus the decree below is generally altered in some respects, often reversed, and entirely changed, giving the cause a form and character only to be learned from the records of this court. A bill is dismissed below, but, on appeal, sustained, and an account ordered here, in taking which the whole evidence is heard, and almost the entire substance of the cause appears in the records of this court."

Dibrell vs. Eastland, 3 Yerger, 533.

And see Newman vs. the Justices of Scott County, 1 Heiskell, 787.

In Tennessee an appeal in an equity case, as this was, is allowed, and on such appeal the Supreme Court re-examines the whole matter of law and the fact appearing in the record.

Code, Section 3155.

Carnes vs. Polk, 5 Heiskell, 244.

A well-understood distinction is taken between what is known as an appeal in error and an appeal. The former merely suspends, but does not abrogate the judgment

In Tennessee and elsewhere the effect of an appeal is to abrogate the judgment or decree appealed from, and to present the cause in the appellate court for a determination *de novo*.

Furber vs. Carter, 2 Sneed, p. 1.
Kimbrough vs. Mitchell, 1 Head, 538.
Smith vs. Holmes, MSS. op. Supreme Court, Tenn., Jackson Fall Term, 1873.
Wiscart vs. Dauchy, 3 Dallas, 321.
Montgomery vs. Anderson, 21 Howard, 386.
The Collector, 6 Wheaton, 194.
Maskall vs Maskall, 3 Sneed, 208.

As a matter of fact, as already shown, Wolf had *no decree* against him when he applied for his discharge in bankruptcy, nor when he obtained it. The decree of the Chancery Court had been in his favor.

And the same would have been true had the decree of the Chancery Court been against him, and he had appealed therefrom.

In the Supreme Court there still would have been *no decree* against him.

Now, why under this state of the facts and the law, had not Wolf the right to bring forward and in the Supreme Court of Tennessee his discharge and rely upon it as a bar to further proceedings in the suit, no final judgment having yet been pronounced?

Section 3167 of the Code of Tennessee provides: "If the judgment or decree of the inferior Court is reversed, the appellate Court shall give such judgment or make such decree as should have been rendered in the inferior Court, and shall issue execution without a *procedendo*, except where the damages to be assessed are uncertain, in which case the Court, if of last resort, shall remand the cause for further proceedings."

But as will be seen a little further on the above section is not mandatory.

And section 4499 of the Code provides: "The Supreme Court may give judgment upon any and all bonds or recognizances, whether in civil or criminal cases, executed in the progress of the cause, under the general provisions of law, or by any lawful order of the Court, either in the inferior or Supreme Court, and enforce the same by execution or otherwise, as in the case of other judgments and decrees of the Court."

And section 3109 of the Code is the same in substance.

I submit the fact that the Supreme Court undertakes to hear and decide the case of *de novo*, and to render and execute such a judgment or decree as may seem to it proper, and to pronounce judgment "upon all bonds and recognizances executed in the progress of the cause, and to enforce the same by execution or otherwise," imposes upon it the duty of receiving and considering such a matter of defence as a pending bankruptcy or a discharge in bankruptcy accruing to a party between the appeal from the Court below and the hearing of the cause in the Supreme Court.

How else can a bankrupt obtain the benefit of the stay of pending suits or the judgment that the discharge is a bar to their further prosecution?

If the practice authorized by the sections of the code just copied is followed, as it was in this case, and the Supreme Court may lawfully refuse to receive a suggestion of the pending bankruptcy of a party to a suit before it, or refuse to allow him to present and have the benefit of his discharge, after it has been obtained, it needs no argument to show that a bankrupt, without any fault or omission on his part may, by that means, be substantially deprived of the rights, privileges and protection conferred upon him by the act of Congress.

But the Supreme Court was not bound, even by the legislation of the State, or by its own practice, to pursue the course it did pursue. Nothing is more common in practice than for

it to decline pronouncing a final judgment or decree, where the judgment or decree of the court below is reversed, and to remand the cause to the court below for further proceedings.

Without particular reference to any legislation on the subject, the settled practice for years has been, in cases at law as well as in cases in equity, to omit pronouncing a final judgment or decree, and to remand the cause in all cases where the losing party has a good cause of action, or a good ground of defence not appearing in the record in such form as to enable the court to give him the benefit of it.

McCandless vs. Polk, 10 Humphreys, 617, 620.
Stovall vs. Bowers, 10 Humph., 560.
Turnley vs. C. & M. R. R. Co. 2 Coldw., 327, 332.
Wilson vs. Smith, 5 Yerger, 379, 397, etc.
Smith vs. Carden, 1 Swan, 28.
Cowan vs Dodd, 3 Coldwell, 279, 284.
Grider vs. Harbinson, 6 Coldwell, 208, 214.
Taylor vs. Taylor, 2 Humphreys, 597.

But the Code, Section 3170, provides:

"The court shall also, in all cases where, in its opinion, complete justice can not be had by reason of some defect in the record, want of proper parties or oversight without culpable negligence, remand the cause to the court below for further proceedings, with proper directions to effectuate the objects of the order, and upon such terms as may be deemed right."

And Section 3168 declares:

"In equity cases the court may retain the cause to take accounts *or ascertain facts*, or remand at its discretion."

No obstacle was in the way of the court because it had pronounced its opinion, or had even actually entered its decree before Wolf's discharge was brought to its notice, and no want of power is made a ground of its judgment refusing to consider the discharge.

In the first place, as is well known, the judgment or decree

during the term, was in the breast of the court, and completely under its control, and it had the unquestioned power, without any legislation, to set aside the judgment or decree, and rehear the cause, and afterwards to pronounce the same, or any other judgment or decree that might appear to it proper.

This power over its judgments is an attribute of every court.

And see the Code of Tennessee, Sections 2974, 2972, 2923, which in terms give the court all the power that could be desired.

But section 4501 of the Code is explicit as follows: "In all cases in which the Supreme Court may give judgment through inadvertance or oversight, when upon the face of the record no cause of action existed against the party, the Court may, upon its own motion vacate such judgment."

The Supreme Court of Tennessee had, therefore, open to it it two courses, either of which would have given Wolf the benefit of his proceedings in bankruptcy and his discharge according to the act of Congress.

1. It could have considered the discharge and have given the proper effect to it by its decree.

2. It could have remanded the cause to the Court below with directions to allow Wolf to present it by a proper amendment as a defence to the further prosecution of the suit.

But it could not lawfully do as it did, retain the case, and ignore the proceedings and discharge in bankruptcy, and pronounce a decree against Wolf and his sureties as if no proceedings in bankruptcy had occurred, and no discharge had been granted.

Regardless of what the State statutes may enact, and of the practice of the Supreme Court of the State, I claim that the bankrupt act is the Supreme law of the land, and that State statutes and the practice of the State Courts must give way where they have the effect of preventing the full and

complete operation of the provisions of the law for the protection of bankrupts.

This Court will not permit the legislation of the States, or the decisions of State Courts, or any rules of practice, technical or substantial, those Courts may adopt, or the conduct of the adverse parties in the litigation to defeat its supervisory jurisdiction in cases where a Federal question is involved, nor to destroy or impair rights conferred by the constitution or laws of the United States on one of the parties.

Gelpcke vs. Dubuque, 1 Wallace, 175.
Riggs vs. Johnson County, 6 Wallace, 166.
Mayor vs. Lord, 9 Wallace, 409.
Supervisors vs. Durant, 9 Wallace, 415.

If it be true that the proceedings in bankruptcy of Wolf and his discharge, under the act of Congress, were a bar to the prosecution of the suit of Louis Stix & Co. to final judgment against him in the Supreme Court of Tennessee, and the Supreme Court has proceeded to render the final judgment against him in disregard of the act of Congress merely because one of its rules of practice, or its peculiar organization forbade it to take notice of Wolf's discharge in bankruptcy, then the very state of facts making it proper for the Court notwithstanding the judgment of the Supreme Court, to give effect to the rights conferred by the act of Congress, is presented.

In Kanouse vs. Martin, 15 Howard, 198, the suit was between a citizen of New York and a citizen of New Jersey, in the Court of Common Pleas of New York county, for a sum exceeding five hundred dollars, and the defendant petitioned for a removal to the Circuit Court of the United States and complied with the requirements of the statute giving the right to the removal, so that his right was complete. The State court then proceeded to inquire into the intention of the plaintiff not to claim more than $499, and allowed him to amend so as to sue for only that sum. The court then overruled the petition for removal, and proceeded with the case, and gave judgment for the plaintiff, which was appealed to the Superior Court of the city of New York, where the judgment of the Court of Common Pleas was affirmed.

A writ of error was then sued out from the Supreme Court of the United States to the judgment of the Superior Court, and it was assigned for error that the State court had proceeded in the cause after the removal of it to the Circuit Court of the United States was complete. But it was objected that by the local law of New York the Superior Court could not consider the error in the proceedings of the Court of Common Pleas, because it did not appear upon the record, which according to the law of the State consisted only of the declaration, the evidence of its service, the entry of the appearance of the defendant, the rule to plead, and the judgment for want of a plea and the assessment of damages; and that the proceedings under the act of Congress, not being part of this technical record, no error could be assigned upon them in the Superior Court. The Superior Court rested its decision on this view.

The Supreme Court of the United States conceded that the Superior Court was correct according to the common and statute law of the State of New York.

But the court held that the act of Congress conferring the right of removal, and pointing out the mode was a law binding upon all the courts of the State; and if the act of Congress both rendered the judgment of the Court of Common Pleas erroneous, and in effect gave the defendant the right to assign that error, though the proceeding did not appear on the technical record, then, by force of the act of Congress, the Superior Court was bound to disregard the technical objection, and inspect the proceedings.

The court then said further that the reason why the Superior Court declined to inspect the proceedings was that the defendant did not plead them to the jurisdiction of the Court of Common Pleas, and thus put them on the record; and admitted that it was generally true that a party claiming a right under an act of Congress must avail himself of some legal means to place on the record that claim, and the facts on which it rests, or he cannot have the benefit of a re-examination of the judgment upon a writ of error; but decided that the duty so to place his claim and the facts on which it rested on the record did not exist in the case before it, because the defendant could not perform it without surrendering his right to have all the proceedings in the Court of Common Pleas cease upon his right to the removal being perfected.

The court concluded upon this part of the case that the act of Congress not only conferred on the defendant the right to remove the suit but it made all subsequent proceedings of the Court of Common Pleas erroneous, and "necessarily required the court, to which the judgment was carried by a writ of error to inspect those proceedings which showed the judgment to be erroneous, and which could not be placed on the technical record consistently with the act which granted he right of removal."

The court said further that the case of Gordon vs. Longest, 16 Peters 97, had proceeded on the same principle. And while admittting the rule that the Supreme Court of the United States upon a writ of error looks only at the technical record, and affirms or reverses the judgment according to what may appear thereon, it declared that the rule "was only one of the rules of evidence for the exercise of its jurisdiction; as a court of error, it prescribes what shall and what shall not be received as evidence of what was done in the court below; and when an act of Congress cannot be executed without disregarding this general rule, it becomes the duty of this court to disregard it. The plaintiff in error having a right to have the erroneous judgment reversed, must also have the right to have the only legal proceedings which could be had consistently with the act of Congress examined to show that error."

WM. M. RANDOLPH,
Of Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

M. WOLF, ELIAS LOWENSTIEN and L. HELMAN, Appellants,
vs.
LOUIS STIX & CO. et al., Appellees.

Motion to Dismiss Appeal.

BRIEF OF

Gantt, Patterson & Lowe,

Marsh Patterson

FOR MOTION.

Supreme Court of the United States,

OCTOBER, TERM, 1877.

M. WOLF,
ELIAS LOWENSTIEN,
AND
L. HELMAN,

—VS.—

LOUIS STIX & CO. ET AL.

In Equity.

This is a motion to dismiss the appeal of M. Wolf, Elias Lowenstien, and L. Helman, taken from the decision of the Supreme Court of the State of Tennessee, at the April Term, 1877—which overruled their application to bring forward and present by petition, *in that Court*, the *certificate of discharge in bankruptcy*, of M. Wolf—and rely on it, as a defense to a decree rendered on a previous day of the term, against said Wolf, as principal, and said Lowenstien and Helman, as sureties.

GROUNDS OF THE MOTION.

1. There is no *Federal question*.

2. There is no litigation,—the appeal can only operate by way of delay.

Such portions of the voluminous Record as bear on the motion, have been printed, and are submitted herewith. (All

references to the Record are to this printed Record prepared for the purposes of this motion.)

1st.—As to the Federal Question.

The Supreme Court of Tennessee did not decide, that the certificate of discharge in bankruptcy of M. Wolf, would, or would not, be a good defense to said decree, if properly pleaded, in a court, that had jurisdiction to hear and determine the question. What that Court did decide will appear from the following extract from its ruling, viz.: "And be-"ing of opinion that no *new* defense can be made in this "Court, and that it is not allowable to set up the defense of "bankruptcy by any proceeding here for that purpose—it is "therefore ordered, adjudged and decreed by the Court, that "the said motion be and the same is now overruled and dis-allowed, and the said petition dismissed, &c."

See Record p. 9.

Mr. Wolf's petition in bankruptcy was filed *after* the *appeal* from the judgment of the *inferior* court. His certificate of discharge was of course subsequent to the appeal.

See Record p. 3.

The Supreme Court of Tennessee has none but appellate jurisdiction. In the view of that Court, the question presented was such as "none but a Court of original jurisdiction could try and determine."

See Biggs vs. White, 4 Heisk. R., p. 506.

Bankruptcy is not pleadable in the Supreme Court of Tennessee.

Biggs vs. White, 4 Heisk., 503.

In delivering the opinion of the Court, in that case, Nicholson, Ch. J., says: "In the legitimate exercise of our appell-"ate jurisdiction, we can only look to the Records, as they are "sent to us from the inferior courts. If upon these we find "errors, as a revising Court, we can correct them, and render

"judgment accordingly. Beyond this, and as a necessary in-
"cident to the jurisdiction, we have the power to adopt all
"rules and orders necessary and proper for carrying out and
"enforcing our judgments. Scott vs. Newman, 1 Heisk., 787.
"But the petition calls on us to entertain a proposition
"which requires us to investigate facts which were in exis-
"tence when the judgment was rendered, and to determine
"whether or not those facts do not show that there is an
"error in the judgment. To accede to this application, neces-
"sarily involves the exercise of original jurisdiction, which
"is forbidden by the Constitution."

See p. 503.

This was said in reference to an application to set up the defense of bankruptcy in the Supreme Court of Tennessee.

The case of Longly vs. Swaine, decided by that Court May 10th, 1871, holds, that "the bankruptcy of the plaintiff or de-
"fendant, after the judgment or decree of an inferior Court,
"cannot be made available in this Court by plea of that fact
"in abatement of the suit here, although the bankruptcy
"may have occurred, and the discharge may have been
"granted before the filing of the Record for writ of error."

See Reporter's Note to Biggs vs. White, 4 Heisk. R., p. 506.

In Henderson vs. Reaves, Legal Reporter, August No., 1877, p. 129, McFarland, Judge, delivering the opinion of the Supreme Court of Tennessee, says: "We have held that
"when the discharge is obtained after the decree in the Court
"below, and while the cause is pending in this Court, that it
"may be set up by bill in chancery after decree in this Court;
"that the question of discharge should be made in this mode,
"and not by suggestion of the fact in this Court."

It is thus manifest that the Supreme Court of Tennessee decided no Federal question against appellants, but only a question of practice—only that appellants applied for relief to the wrong tribunal—and not that they were not entitled to relief at all. Nothing was said as to the sufficiency or insuffi-

ciency of the grounds for relief, when presented to a Court that had power to hear and determine it.

It does not follow that there is a Federal question, because a certificate of discharge in bankruptcy, under the Act of Congress, is ruled not to be pleadable in the Supreme Court of Tennessee, but that it must be set up, and relied on in the Courts of original jurisdiction in that State. Such a decision is merely one of local practice. It depends solely upon the Constitution and laws of Tennessee, as understood and construed by the Supreme Court of the State.

"To give this Court jurisdiction over the judgment of a "State Court, it must appear that the decision of a Federal "question presented to that Court, was necessary to the deter- "mination of the cause, and that it was actually decided, or "that without deciding it, the judgment as rendered could "not have been given."

Brown vs. Atwell, Adm., 92 United States R., p. 327.

"It is not enough to give jurisdiction that a Federal question was argued, or presented to that Court for decision."—*Id.*

See also Nonconnah Turnpike Co. and others vs. The State of Tennessee ex. rel., A. S. Tally et. al., Supr. Court of the United States, MS. opinion, October Term, 1877.

Scott vs. Kelly, 22 Wall., p. 57.

Exparte Smith, 94 United States R., p. 455.

2nd.—Is this not a Case without any Actual Litigation?

It is a liability founded in fraud.

See Record, pp. 1, 2, 4.

The decree expressly so adjudges.

See Record, pp. 3, 4.

The bill was to reach, and subject the property in the hands of Wolf, the fraudulent vendee.

See Record, pp. 1, 2.

The property was seized while in his hands by attachment, and passed into the custody of the levying officer.

See Record pp. 1, 2.

M. Wolf, under the laws of Tennessee, gave bond to take the place of the property, and be responsible for it or its value, with Elias Lowenstein and L. Helman as his sureties.

See Record pp. 2, 3.

The liability of the sureties, according to the condition of the bond, depended upon the question of fraud, and the right of the complainants, to subject the property in the hands of Wolf, the fraudulent vendee.

The property was declared liable, and said Wolf held bound for its value.

See Record, pp. 3, 4.

A certificate of discharge in bankruptcy is no answer to such a liability.

The 33d section of the Bankrupt Act declares that "no debt created by the fraud or embezzlement of the bankrupt * * * shall be discharged by proceedings in bankruptcy."

Revised Statutes U. S., sec. 5117, p. 993.
Bump. on Bk. (9 ed.) p. 723.

The word *debt* is not used in the technical sense, but means any *liability* having its *origin in fraud*.

Bump. on Bk. (9 ed.) p. 728 and notes.
Stokes & Leonard vs. Mason, 12 Nat. Bk. Reg. 498.
Stokes & Leonard vs. Mason, 10 Rhode I. R., p. 261.
Jones's Exrs. vs Clark, et al., 25 Gratton, pp. 642, 646, 678, 690.

The last named case is precisely in point.

The liability arose out of a fraudulent purchase of bonds, and the bankrupt interposed his certificate of discharge in bankruptcy, and it was held no answer to such a liability.

The fact of fraud may be shown, as a conclusive answer to the certificate of discharge in bankruptcy, in any Court where the bankrupt is sued.

In Re. Ward, E. Roberson, 6 Blatch, C. C. R., p. 253.
Broadnax vs. Bradford, 50 Ala. R., p. 270; 10 Rhode I. R., p. 261.
Bump. on Bankruptcy, pp. 728, 729, 730, and notes, (9 ed.)

See also—,

52 New Ham. R., 301; 13 Nat. Bank. Reg., p. 52; 78 Ill. R., pp. 205 & 7; 2 Benedict C. C. R., p. 154.

The fact that the fraudulent claim has been merged in a judgment, or that a forthcoming, or replevy bond has been given by the fraudulent grantee, does not purge the transaction, or relieve the bankrupt from the consequences of the fraud. The question is, did the liability have "its root in fraud?"

C. H. Whitehouse, Petition, &c., Nat. Bank. Reg. p. 68.
In Re. Chas. G. Patterson, 1 *Id.*, 307.
Warner vs. Crookhite, 13 *Id.*, 52.
Bump. on Bankruptcy, 9 ed., pp. 728, 729 and notes.

The cases in 45 Vt. R., p. 152, and 52 N. Y. R., pp. 404, 407-8, are not in conflict with the doctrine that makes a discharge in bankruptcy inoperative against a fraudulent demand. In one of these cases the fraud was waived, and the recovery was on contract. In the other, the judgment failed to show the fraud, and the question was whether it could be established, by proof *aliunde*, or not.

It is believed that all authority concurs in holding that where a liability grows out of fraud, and the fact of fraud is established by the judgment of a Court of competent jurisdiction, that the judgment remains in full force, notwithstanding a discharge in bankruptcy.

The judgment of the Supreme Court of Tennessee finds, and declares Wolf liable, and that the liability originated in

fraud. It binds him. It binds his sureties. The discharge in bankruptcy is plainly no answer to such a debt or liability. There is no question to litigate involved. The questions are closed. There is nothing but delay involved.

GANTT, PATTERSON & LOWE,
Sols. for Motion to Dismiss.

Of Counsel for Defendants in Error

JOHN B. ANDERSON *vs.* C. E. REAVES ET AL.

SUPREME COURT OF TENNESSEE, NASHVILLE, JANUARY TERM, 1877.

M'FARLAND, J., DELIVERED THE OPINION OF THE COURT.

This voluminous record presents a single question. The bill shows that a decree for money was rendered against complainant and others, in favor of C. E. Reaves, on the 2nd day of November, 1871, which was by appeal vacated and the cause removed to the Supreme Court. That afterwards, on the —— day of December, 1871, the present complainant, Anderson, obtained his discharge in bankruptcy, which by this bill he prays to have set up as a discharge, the debt being one which was provable in bankruptcy. The record of the former case shows that during its pendency the fact that proceedings in bankruptcy had been instituted by the present complainant, Anderson, was suggested and admitted of record, and by consent the cause was revived against his assignee, but no further notice was taken of the assignee, and the final decree was rendered against Anderson. The discharge having been subsequently obtained, is sought to be set up by this bill.

We have held that when the discharge is obtained after the decree in the court below, and while the cause is pending in this court, that it may be set up by bill in chancery after decree in this court. That the question of discharge should be made in this mode, and not by suggestion of the fact in this court.

The only question then is, whether this is changed by the fact that the bankruptcy proceedings were instituted before the decree in the court below, and that this fact was suggested in the cause, and the cause then revived against the assignee. Application might have been made in the court below to stay proceedings until action could be had upon the question of discharge; but as this was not done, the question is whether the party is to be thereby deprived of the benefit of his discharge.

We think not. See Bump on Bankruptcy, p. 600. Where the bankrupt fails to plead a discharge which he has already obtained, the judgment against him will not be disturbed. The decree of the chancellor sustaining a demurrer will be reversed, and the cause remanded to be proceeded with, the defendant paying the costs of this court.